72-752

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Supreme Court, U. S.
F I L E D
NOV 22 1972
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE
UNITED STATES

72-752

STATE OF TENNESSEE

VS

CECIL ROY THURMAN, petitioner

PETITION FOR CERTIORARI TO THE SUPREME COURT OF TENNESSEE, FILED IN BEHALF OF THE DEFENDANT, AND SPECFICATION OF ERRORS AND SUPPORTING BRIEF AND ARGUMEGNT.

J. C. MCMURTRY AND G. BATTLE CLAIBORNE
ATTORNEYS AT LAW
GALLATIN, TENNESSEE
FOR DEFENDANT
CECIL ROY THURMAN

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CITATIONS TO OPINION BELOW:

Memorandum Opinion of the Tennessee Court of Criminal Appeals is not yet reported. A copy of the opinion of the Tennessee Court of Criminal Appeals is annexed hereto as an Appendix at page A-1.

JURISDICTIONAL STATEMENT

MAY IT PLEASE THE COURT:

The jurisdiction of the Court is invoked under Judicial Code Section 237, as amended (U.S.C.A. Title 28, Section 344).

The case involves conviction of a defendant of the offense of transporting more than one gallon of untaxed whiskey, based upon a search of defendant's automobile without a warrant upon a consent obtained from the defendant without informing him of his "Miranda" rights.

The review sought here involves the right of a citizen under the Fourth Amendment to the United States Constitution to be secure from unreasonable searches and seizures.

The petition is timely since the Supreme Court of Tennessee (the Court of last resort in Tennessee) has denied petitioner's petition for a writ of certiorari to the Tennessee Court of Criminal Appeals for review of that court's denial of certain rights and privileges guaranteed petitioner by the Constitution of the United States. Petitioner's conviction was affirmed by the Tennessee Court of Criminal Appeals on July 12, 1972. The Tennessee Supreme Court denied the petition for a writ of certiorari on September 18, 1972.

THE QUESTIONS PRESENTED

1. Did the Supreme Court of Tennessee deny the defendant his constitutional guarantee of due process of law by refusing to overturn a conviction based upon a search which was supposedly made with defendant's consent, but which was made before defendant was advised of his rights under the "Miranda" rule.

2. Did the Supreme Court of Tennessee deny the defendant his constitutional guarantee of due process of law by refusing to overturn a conviction based upon evidence obtained through search without a search warrant, when the arresting officer had ample opportunity to obtain a search warrant.

CONSTITUTIONAL PROVISIONS INVOLVED:

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

REASONS FOR GRANTING THE WRIT:

Question No. 1. The failure of the arresting officer to inform petitioner of his constitutional rights before obtaining consent to search petitioner's automobile made the officer's actions illegal search.

"Where one accused of illegally possessing intoxicating liquor was confronted by officers a search warrant, and a declaration of the purp to search the premises if the whiskey was not s that defendant voluntarily showed the officers whiskey did not place him beyond the guaranty against unlawful search provided in [Tenn.] Cons

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Art. 1, § 7; the act being one of necessity, rather than volition." Hampton v. State, 148 Tenn. 155, 252 S W 1007 (1923).

"the efforts of the courts and their officers to bring the guilty to punishment, praisworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavors and suffering which have resulted in their embodiment in the fundamental law of the land. Illegal practises should find no sanction in the judgment of the courts, which are charged at all times with the support of the Constitution, and to which the people have a right to appeal for the maintenance of fundamental rights. Hence the rule that illegal evidence cannot be received to produce a verdict of guilty." Tenpenny v. State, 151 Tenn. 669, 270 S W 989 (1924).

"every reasonable presumption is against an accused's waiver of his constitutional rights, particularly when he is in custody, held that the accused's turning over the keys to another automobile while under arrest, after being told upon his inquiry that the police had no warrant but that they could get one, and during a period of 'dramatic excitement' when police had stopped his car with drawn pistols and a riot gun, could not have constituted a 'freely and intelligently given' consent." Weed v. United States, 340 F2d 827 (1965).

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Question 2. The arresting officer in the present case obtained information regarding petitioner at about 7:00 p.m. on the day of the arrest. The arrest was made at approximately 9:50 p.m., almost two hours later. Between the time the officer received the information and the time of the arrest, the officer was in the Sumner County Courthouse, where he knew a magistrate was on duty. The officer also knew who he was looking for and what contraband he was looking for. Nevertheless, he failed to obtain a search warrant. (certified record, pp. 26-66). His subsequent search was therefore illegal.

"Warrantless search of automobile in police custody at a time after occupant's arrest and under circumstances where there was no danger of removal was illegal, and testimony resulting from search was inadmissible." Smith v. United States, 335 F2d 270 118 U.S. App. D.C. 235 (1963).

"Fact that federal officers seized only contraband property which could have been described in a search warrant had one been issued did not detract from illegality of a search and seizure made without a warrant." United States v. Costner, 217 F.Supp. 644 (Tenn.1963).

"A search, illegal in its inception, is not made legal by what it turns up." United States v. Roberts 90 F.Supp. 718 (Tenn. 1950).

"Person making search without warrant has burden of justifying search, such as in "some grave emergency." United States v. Cook, 213 F.Supp. 568 (Tenn. 1962)

"In cases of search without warrant, though probable cause is established, issue remains as to whether failure to obtain warrant was reasonable under facts and circumstances." United States v. O'Leary 201 F.Supp 926 (Tenn.1962).

"Where police know in advance the location of evidence and intend to seize it, requirement of warrant to seize imposes no inconvenience, or at least none which is constitutionally cognizable." Coolidge v. New Hampshire, 91 S.Ct.2022 (N.H.1971).

"Where officers of Alcohol Tax Unit about two o'clock in the afternoon had learned that defendant was storing illegal whiskey in his house, but officers, without securing a warrant, went to defendant's premises in the evening and stationed themselves in

a field adjacent to house and observed a truck come to house and that two individuals proceeded to carry cartons from house and load them in truck, and thereupon officer approached truck and went into the house and arrested one of persons loading truck in defendant's bedroom, the entry of house and arrest of one of truck loaders was an unlawful search and seizure." Baxter v. United States, 188 F.2d 119 (Tenn. 1951).

RELIEF

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

J.C. MCMURTRY

Guthrie Building

Gallatin, Tennessee

Counsel for Petitioner

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APPENDIX

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CECIL ROY THURMAN

Plaintiff in Error

vs. SUMNER CRIMINAL

STATE OF TENNESSEE

Defendant in Error

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

APPEAL FROM THE CRIMINAL COURT OF

SUMNER COUNTY

HONORABLE THOMAS BOYERS, III, JUDGE

OPINION FILED

FOR CECIL ROY THURMAN
HONORABLE J. C. McMURTRY OF GALLATIN, TENNESSEE
FOR STATE OF TENNESSEE
STATE ATTORNEY GENERAL, DAVID M. PACK
ASSISTANT ATTORNEY GENERAL, W. HENRY HALE
DISTRICT ATTORNEY GENERAL, O'BRIEN PRICE

JUDGMENT AFFIRMED
JUDGE CHARLES GALBREATH

OPINION

The validity of the conviction of the appellant of unlawfully transporting whiskey depends in turn upon the validity of the arresting officer's search of the trunk of the automobile which the defendant was operating at the time. Prompted in part by a strong smell the officer testified he recognized as "white whiskey" the trunk was opened with a key obtained from the defendant and found to contain 31 gallons of untaxed whiskey.

Some two hours before the arrest of the defendant in White House, Gallatin Police Officer Charles Greer was, according to his testimony credited as truthful by the jury, contacted at his home by an informant considered by him from many past helpful tips given over a seven or eight year period to be quite reliable. He was informed that the defendant

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and an accomplice, J. C. Fuqua, would transport a substantial amount of bootleg whiskey from Sumner County to Robertson County that night in a taxi cab owned by Fuqua or a Pontiac automobile owned by the appellant Thurman. Both men and their respective vehicles were well known to the officer.

Acting on the information received Officer Greer and others stopped a taxi cab being driven by Guqua and the plaintiff in error's 1961 Pontiac which he was operating directly behind the taxi. As the officer approached the Thurman car the defendant said, again according to the uncontradicted testimony of the officer, "Mr. Greer, you have hit the jack pot this time," and explained that he had thirty-one gallons in the trunk. The officer also testified in an out of jury investigation by the court on defendant's motion to suppress the evidence that Thurman voluntarily handed him the keys to the

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trunk and consented to the officer's request to look into it saying, "Yes, sir, because you have got me this time."

In argument it is contended that the plaintiff in error did not voluntarily and spontaneously admit he was transporting whiskey and that he gave no consent to the officer to search the trunk. No testimony was presented to dispute the officer's version of the events leading up to the arrest and the consentual search, and the trial judge was amply justified in ruling against the motion to suppress the evidence.

Our Supreme Court quite recently overruled an opinion of this Court to the contrary and held that an arrest based upon less probable cause than appears in this case was valid. In State v. Tolden, 224 Tenn. 119, 451 S W 2d 432, the following appears applicable to the facts in this case:

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"The facts upon which the officers made the arrest are as follows:

"About 6:30 o'clock, A.M., on October 6, 1967, two officers of the City of Chattanooga, Tennessee received by work of mouth from a reliable informer the following information: That between the hours of 7:00 and 8:00 o'clock, A.M. of that morning an old model green Buick, driven by a colored male with a physical defect, would pass through the intersection of Twenty-Fourth Street and Dobbs Avenue in the City of Chattanooga, with unstamped whiskey in the car. The officers having previously received reliable information from this informant went to this intersection to be on the lookout for this described car and driver. About 8:45 o'clock, A.M., a 1953 Buick, color white over green, driven by a male, colored, entered the intersection. The officers recognized the driver of the Buick as being the respondent Tolden, and knew that he had a physical defect. Respondent Tolden was arrested and eleven gallons of unstamped whiskey was found in the car.

"T.C.A. sec. 40-803 authorizes and officer to make an arrest without a warrant by the following language:

(2) When the person has committed a felony, though not in his presence.

(3) When a felony has in fact been committed,

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and he has reasonable cause for believing the person arrested to have committed it.

"In Jones v. State, 161 Tenn. 370, 33 S.W. 2d 59 (1930), this Court commented upon the above copied portions of T.C.A. sec. 40-803 as follows:

The substance of these provisions is that an officer may lawfully proceed to arrest without a warrant any person when the officer has, with reasonable cause, been led to believe that the person has committed, is committing, or is about to commit a felony. It is essential to the protection of society that a wide discretion be vested in officers chosen to enforce our laws against felonies. It is impossible to define 'reasonable cause' in terms to fit all cases arising. Each case must stand on its own facts. A narrow construction would open the way for the escape of desperate criminals and the defeat of justice. One too liberal would lead to the harassment of the innocent. But the officer may not be required to wait for assurance, for evidence which would convict; when circumstances fairly point to a felony it is his duty to act, and act promptly. 161 Tenn. at 373, 33 S.W.2d at 60.

"In Beck v. State of Ohio, 379 U.S.89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), the Court stated:

Whether that arrest was constitutionally valid

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depends * * * upon whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed * * * an offense.

"The issue here will depend on whether the officers at the time respondent Tolden drove through the intersection had reasonable cause to believe respondent Tolden was committing a felony; that is, transporting unstamped whiskey.

"Respondent Tolden argues the fact the officers had no information as to the model of the car, license number, or any other fact about the car, making it possible to distinguish it from any other similar cars, demonstrates the officers had no reasonable cause to believe that he was committing a felony. We agree these factors should be considered but the weakness of this argument is that it is directed solely to identification of the car. The judgment on the issue here is made by taking into consideration all the circumstances which include the reliability of the informant, the identity of the car, the identity of the crime, and the time and place.

"Under all the circumstances we think the officers had reasonable cause to make this arrest. While it can be argued the identity

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> of the car given the officers was general in nature, we think any failure here is more than removed by the identity given the officers that the driver would be a colored male, and have a physical defect. The identity of the car and driver viewed in light of the information that said car and driver would pass through a particular intersection at a given time with unstamped whiskey therein gave the officers reasonable cause to believe the driver of the car was committing a felonw. Under the circumstances here we attach no importance to the fact that the informant told officers the car would be at the intersection between the hours of 7:00 and 8:00 o'clock, A.M., when, in fact, it arrived forty-five minutes later."

It will be noted that the facts related by the informant in this case were much more specific as to the identity of the defendant and the automobile in which he would be transporting the whiskey than those in Tolden. Also, the evidence before us justifies the finding that the search was consented to by the defendant. Certainly the evidence does not preponderate against such a finding, and we are

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therefore bound by the jury's verdict. See McBee v. State, 213 Tenn. 15, 372 S W 2d 173.

It results that the assignments of error directed to the sufficiency of the evidence and the failure of the trial judge to suppress the evidence are overruled.

The remaining assignment of error concerns an improper and unresponsive answer made by the principal witness for the State in explaining what he felt prompted the appellant's remark as to the officer's "hitting the jack pot this time." Officer Greer, perhaps inadvertently, perhaps deliverately, added, "I had just caught him two or three days before on a whiskey violation."

The interjection of such proof was completely out of order and had no place in the trial of the lawsuit. It may well have been that the trial judge would have been justified in granting a mistrial as

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a result of what may have been highly prejudicial testimony. No motion was made by privately retained counsel for a mistrial, however, and the trial judge cannot be held in error for the failure to do that which he is not requested to do in the absence of a clear showing that it was his duty to do so on his own motion.

Instead of moving for a mistrial the defendant's attorney promptly moved that the objectionable testimony be stricken and the trial judge immediately said, "I instruct the jury to ignore that voluntary statement on behalf of the witness." While it is contended that the judge should have renewed his admonition to the jury to disregard the improper reference to other bootlegging charges against the defendant during his final charge, it is doubtful if he could have any more effectively impressed this point on the jury by so doing. Actually,

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often the less said about such inadmissible testimony the better, as repeated reference to it may serve to implant it even further into the minds of the jury. The assignment is overruled, and the judgment sentencing the defendant to serve a year and a day in the penitentiary is affirmed.

CHARLES GALBREATH, JUDGE

CONCUR:

Mark A. Walker, Judge
John A. Mitchell, Judge

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NOTICE OF JURISDICTIONAL STATEMENT
IN SUPPORT OF PETITION FOR CERTIORARI TO THE
ATTORNEY GENERAL OF THE STATE OF TENNESSEE

You are hereby notified that the petitioner in the foregoing cause is filing with the Clerk of the Supreme Court of the United States this Jurisdictional Statement in support of his petition for certiorari to remove this cause from the Supreme Court of the State of Tennessee in denying his petition for writ of certiorari said denial was entered on the 18th day of September, 1972, and that same will be presented to the Supreme Court of the United States for consideration.